Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	
Pay Telephone Reclassification	)	CC Docket No. 96-128
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1997 **Released: December 17, 1997**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 9, 1997, the Commission adopted the *Order on Remand* that established a new default rate for per-call compensation for subscriber 800 and access code calls originated from payphones.[1] That order was adopted in light of the decision of the United States Court of Appeals for the District of Columbia Circuit ("the court"), which vacated and remanded portions of the Commission's earlier *Payphone Orders*.[2] Personal Communications Industry Association ("PCIA") has asked the Commission to stay its *Order on Remand* until March 9, 1998, at a minimum, or until two conditions are met: (1) local exchange carriers ("LECs") provide unique payphone coding digits that enable call blocking; and (2) interexchange carriers ("IXCs") demonstrate that they can provide call blocking at a reasonable price for

[1] *Pay Telephone Reclassification and Compensation Provisions*, Second Report and Order, FCC 97-371 (rel. Oct. 9, 1997) ("*Order on Remand*"), *pets. for recon. pending, review pending, MCI Telecomm. Corp. v. FCC*, D.C. Circuit No. 97-1675 (filed Nov. 7, 1997); *Sprint Corp. v. FCC*, D.C. Circuit No. 97-1685 (filed Nov. 13, 1997); *Personal Communications Industry Association v. FCC*, D.C. Circuit No. 97-1709 (filed Dec. 1, 1997; *Illinois Public Telecommunications Association v. FCC*, D.C. Circuit No. 97-1713 (filed Dec. 3, 1997).

[2] *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) (*"Illinois Public Telecomm."*), *affirming in part and vacating in part, Pay Telephone Reclassification and Compensation Provisions*, 11 FCC Rcd 20,541 (1996) ("*Report and Order*"); 11 FCC Rcd 21,233 (1996) ("*Order on Reconsideration*") (collectively the "*Payphone Orders*").

substantially all access code and subscriber 800 payphone calls.[3] In particular, PCIA asks for a stay of the *Order on Remand* such that per-call compensation obligations are not due to payphone service providers ("PSPs") for subscriber 800 and access code calls that originate from payphones until the two conditions are met, and further that in staying these compensation obligations, the Commission bar IXCs from passing on any charges or rate increases to end users.[4] PCIA contends that the order on remand is likely to be set aside on review, that PCIA will suffer irreparable harm if the default compensation provision is not stayed, and that a stay will not injure other interested parties or the public interest.[5] Two parties filed oppositions to PCIA's motion for stay.[6] We deny PCIA's request for a stay, because, as discussed more fully below, we conclude that the Commission's *Order on Remand* is likely to be affirmed on review; a stay is not necessary to avoid irreparable harm to PCIA or its members; and a stay would injure other interested parties and the public.

II. BACKGROUND

2. In the *Payphone Orders*, the Commission implemented the provisions of Section 276 of the Communications Act.[7] Section 276 requires, among other things, that "all payphone service providers are fairly compensated for "each and every" payphone call.[8] The court affirmed many aspects of the Commission's *Payphone Orders*, but it vacated the interim default per-call compensation rate the Commission had set for subscriber 800 and access code calls at the same market-based $0.35 rate as for local coin calls. The court held that the Commission had not justified its conclusion that the costs of local coin calls were similar to those of subscriber 800 and access code calls, and it remanded that issue, among others, to the Commission for further proceedings.[9] After receiving comment on this and other issues,[10] the Commission adopted the *Order on Remand*, establishing an interim default compensation rate of

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[3] PCIA Motion for Stay, filed December 1, 1997. PCIA concurrently filed a petition for review with the court. *Id.* at 3.

[4] *Id.* at 2.

[5] *Id.* at 3.

[6] The RBOC/GTE/SNET Payphone Coalition (LEC Coalition) Opposition was filed on December 9, 1997 and the American Public Communications Council (APCC) Opposition was filed on December 10, 1997. Both the LEC Coalition and APCC filed motions for leave to file out of time. Those motions are granted. APCC states that it concurs in the LEC Coalition Opposition. APCC Opposition at 1.

[7] 47 U.S.C. § 276. Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996).

[8] 47 U.S.C.§ 276(b)(1)(A).

[9] *Illinois Public Telecomm.*, 117 F.3d at 564.

[10] *See* Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, CC Docket No. 96-128, DA 97-1673 (rel. Aug. 5, 1997) (*"Notice"*).

$0.284 per call for the first two years of per-call compensation.[11] This rate was calculated by adjusting the market-based local coin rate to account for cost differences between local coin calls on the one hand, and subscriber 800 and access code calls on the other.[12] The Commission also extended the default per-call compensation period from one to two years, to allow participants, including IXCs, local exchange carriers ("LECs"), and PSPs, additional time to adjust to market-based payphone compensation for subscriber 800 and access code calls.

3. In the *Payphone Orders,* the Commission required that LECs provide payphone-specific coding digits to PSPs, and that PSPs transmit such coding digits with calls originated from their payphones, before they can receive per-call compensation from IXCs for subscriber 800 and access code calls.[13] On October 7, 1997, the Common Carrier Bureau ("Bureau") granted, on its own motion,[14] a limited waiver of this requirement for five months, until March 9, 1998, to those LECs and PSPs that cannot provide payphone-specific digits as required by the *Payphone Orders*.[15] The limited waiver affords LECs, IXCs, and PSPs an extended transition period for the provision of payphone-specific coding digits without further delaying the payment of per-call compensation as required by Section 276 of the Communications Act.[16] We noted, however, that LECs and PSPs that are capable of transmitting coding digits remain obligated to do so.[17]

4. On December 5, 1997, the Bureau denied a motion for stay filed by MCI Telecommunication Corporation (MCI) requesting that the Commission stay its *Order on Remand* pending

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[11] The default per-call rate is the rate that applies in the absence of a negotiated agreement between parties during the first two years of per-call compensation. Thereafter, the default rate, in the absence of a negotiated agreement, is the market-based local coin rate less $0.066. For coinless payphones, $0.284 will continue to be the per-call default rate, absent a negotiated agreement. *Order on Remand* at para. 1, note 1.

[12] *Order on Remand* at paras. 42-67. The Commission has consistently expressed: (1) the benefits of a market-based approach to payphone compensation; and (2) why it relied on the deregulated market-based local coin rate as a market surrogate used as the starting point for adjusting for differences in costs for subscriber 800 and access code calls. *See Report and Order* at 20,576-79, paras. 67-73; *Order on Reconsideration* at 21, 258, paras. 50, 21, 266-69, paras. 66-71; *Order on Remand* at paras. 23-28, 42, 44. *See* LEC Coalition Opposition at 8.

[13] *See Report and Order*, 11 FCC Rcd at 20,591, paras. 98-99; *Order on Reconsideration*, 11 FCC Rcd at 21,265-66, para. 64, and 21,278-80, paras. 93-99.

[14] *See* Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3.

[15] *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-2162 (Com. Car. Bur. Oct. 7, 1997) ("*Waiver Order*").

[16] *Id.* at paras. 1-2.

[17] *Id.* at para. 3.

review of that order by the court.[18] In particular, MCI sought a stay of that order insofar as it adopted a revised "default" compensation provision governing the payments that IXCs, such as MCI, make to PSPs, in the absence of a negotiated payment, for subscriber 800 and access code calls that originate from payphones.[19] The Bureau denied that motion, concluding that: MCI is not likely to prevail on the merits of its appeal; MCI had not demonstrated that irreparable harm would flow to it and other IXCs; and a stay likely would injure other interested parties and the public.[20]

III. DISCUSSION

5. In determining whether to stay the effectiveness of one of its orders, the Commission applies the four-factor test established in *Virginia Petroleum*, as modified in *Washington Metro.*[21] Under that test, a petitioner must demonstrate that: (1) it is likely to prevail on the merits of its petition for review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. As explained more fully below, we find that PCIA has not satisfied any of the four factors for granting a stay.[22]

1. Success on the Merits

6. We conclude that PCIA is unlikely to succeed on the merits of its petition for review filed with the court. PCIA argues that the Commission's decision to enforce carriers' compensation obligations, while waiving LEC obligations to provide coding digits until March 9, 1998, and without considering the cost of implementing call blocking technologies, is inconsistent with the Commission's rationale for choosing market-based compensation.[23] PCIA argues that the Commission justified the use of the market-based standard on the ground that carriers could block calls, and the inability of carriers to do so at this time thwarts the justification for the compensation method. PCIA's argument, however, does not correctly reflect the Commission's decisions either in the *Payphone Orders* or the *Order on Remand*. As discussed below, the establishment of a default compensation rate was itself intended, in part, to compensate for any

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[18] Memorandum Opinion and Order, CC Docket 96-128, DA 97-2565 (rel. Dec. 5, 1997) (*"MCI Order"*).

[19] *Id.* at para 1.

[20] *Id.* at paras. 1, 3-8.

[21] *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958) (*"Virginia Petroleum"*), as modified in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*"Washington Metro."*).

[22] The court has held in certain circumstances that a stay may be granted based on a high probability of success and some injury, or vice versa. *See CUOMO v. United States Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985) (*"CUOMO"*). As discussed below, however, we find that PCIA has shown neither a high probability of success nor a high irreparable injury in its motion for stay.

[23] PCIA Motion for Stay at 3.

unequal bargaining power arising out of the inability of carriers to block payphone calls.[24] Moreover, in the *Payphone Orders* the Commission required that LECs and PSPs provide payphone-specific coding digits to ensure that IXCs could pay per-call compensation, not because they also can be used for blocking calls from payphones during the interim period while the default per-call rate is in effect.[25] Thus we conclude that PCIA's arguments will not prevail in the court of appeals.

7. In *Illinois Telecomm.*, the court remanded the per-call default compensation issue to the Commission on the ground that the Commission had not justified its conclusion that the costs of local coin calls were similar to those of subscriber 800 and access code calls.[26] The court did not hold, however, that the Commission erred in using a market-based rate because some carriers lack the ability to block calls. Although the court noted that call blocking technology was available, and acknowledged that the ability to block calls gave IXCs leverage in negotiating rates, the court held that the per-call default rate adopted by the Commission should be reasonably justified so that IXCs are "not forced to resort to call blocking only because the default rate has been set at an unreasonable level."[27] On remand, the Commission obtained further data on cost differences, and explained fully the cost adjustments to the local coin rate, which justified a reduction in the per-call compensation for subscriber 800 and access code calls, absent a negotiated agreement, from $0.35 to $0.284.[28] The Commission considered alternatives to the market-based approach to establish a default rate, but rejected them as not required either by the court's remand or by the statutory standards. The Commission also concluded that the proposed alternatives were inferior to its chosen approach.[29] The Commission's actions are consistent with the agency's statutory

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24 *Order on Remand* at paras. 23-28, 41-67, 117-122.

25 *See Report and Order*, 11 FCC Rcd at 20,591, paras. 98-99; *Order on Reconsideration*, 11 FCC Rcd at 21,265-66, para. 64, and 21,278-80, paras. 93-99.

26 *Illinois Public Telecomm.*, 117 F.3d at 564.

27 *Id.*

28 *Order on Remand*, at paras. 16-67. Thirty comments and thirty reply comments were received in response to the *Notice*. In the remand proceeding, parties claimed that only a rate derived from cost data on the record, rather than a market-based approach adjusted for cost differences, would provide a valid per-call rate. *Order on Remand* at paras. 69-75. In the *Order on Remand*, the Commission performed an analysis of the long run costs of payphone service based on cost information on the record that concluded that the cost per-call for a provider to install a payphone was in the range of $0.247 to $0.281, per call. *Order on Remand* at para. 119. Assumed to be a lower boundary of per-call compensation, this alternative approach, which the Commission rejected as not being consistent with the goals of Section 276, resulted in a per-call rate not significantly different from the adjusted market-based rate of $0.284 that the Commission ultimately adopted. *Id.* at para. 119.

29 *Order on Remand* at paras. 16-28. The Commission concluded that the adjusted market-based per-call rate it established promotes the goals of Section 276 of the Act, fair compensation, the deployment of payphones, and competition. *Id.* at para. 117.

mandate to ensure compensation for "each and every" call, and are fully responsive to the court's remand of the interim compensation issue.[30]

8. In the *Order on Remand*, the Commission stated that it established a default per-call rate "because certain call blocking capabilities are not yet available to participants in the provision of access code and subscriber 800 calls from a payphone, and thus the market is not yet free of impediments that interfere with the competitive negotiated process."[31] This statement directly contradicts PCIA's claim that a stay is justified because the default per-call rate adopted in the *Order on Remand* depends on the availability of call blocking capability. Rather, it underscores that the establishment of a default per-call compensation rate was itself intended to address the possibility of unequal bargaining power between PSPs and carriers. In the *Payphone Orders*, the Commission concluded that, once competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones.[32] It is only in cases where the market does not or cannot function properly that the Commission needs to take affirmative steps to ensure fair compensation.[33] For example, because the Telephone Operator Consumer Services Improvement Act ("TOCSIA") requires all payphones to unblock access to alternative operator service providers ("OSPs") through the use of access codes (including 800 access numbers), PSPs cannot block access to 800 numbers generally. TOCSIA does not, however, prohibit an IXC from blocking subscriber 800 numbers from payphones, particularly if the IXC wants to avoid paying the per-call compensation charge on these calls.[34]

9. Further, in the *Order on Remand*, the Commission addressed concerns, such as those raised by PCIA, that there may be market imperfections in the negotiation process among IXCs, LECs, and PSPs with regard to the transition to unregulated market-based per-call compensation. As such, the Commission extended the one year per-call default rate time period established in the *Payphone Orders* to two years in the *Order on Remand*. The Commission stated that it "recognized that competitive conditions, which are a prerequisite to a deregulatory market-based approach, did not exist yet, and would not be achieved instantaneously."[35] The Commission did indicate that over time the market-based

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[30] The Commission has the authority to employ different methodologies and/or regulatory models to arrive at a particular rate (*see Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968)), has the authority to exclude suspicious data or statistical outliers, and is not required to include all data when determining a rate (*see Bell Atlantic Tel. Co. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)).

[31] *Order on Remand* at para. 122, note 325.

[32] *Report and Order,* 11 FCC Rcd at 20,577, para 70. *See also Order on Remand* at paras. 23-28.

[33] *Order on Remand* at para. 122, note 325.

[34] *Id.*

[35] *Id.* at para. 11. The Commission noted that imperfections in the marketplace had led it to establish a default rate and acknowledged that additional time is necessary to transition to market-based rates. On the record, IXCs expressed concerns about deregulated per-call rates after the default rate period, and LECs claimed that there were problems in providing coding digits as required by the *Payphone Orders*. *Order on Remand* at para. 121.

approach would not overcompensate PSPs because carriers have significant leverage, including the ability to block calls, and to negotiate for lower rates.[36]

10. In addition, the waiver of the payphone coding digit requirements is more limited in effect than PCIA claims. The *Waiver Order* stated that at most 40% of the payphones were affected by the waiver.[37] Moreover, as discussed above, pursuant to the waiver, LECs and PSPs that are capable of transmitting coding digits are obligated to do so.[38] Although PCIA argues that it is unable to block certain calls for which its customers must pay compensation,[39] as discussed above, due to statutory constraints, LECs and PSPs are unable to block the use of their payphones by PCIA's customers, and absent a negotiated agreement, the PSPs would not receive compensation without the requirements of the *Payphone Orders* and the *Order on Remand*.[40] We concluded in the *Waiver Order* that, on balance, the public interest warranted granting the waiver.[41] We similarly conclude here that the equities under the circumstances and the goals of Section 276 make it clear that the substantive grounds advanced by PCIA in support of its request do not justify a delay in per-call compensation for subscriber 800 and access code calls. For the forgoing reasons, we conclude that PCIA is not likely to prevail on the merits of its appeal.

2. Irreparable Harm

11. We find that PCIA has not shown that its members will suffer irreparable harm and, thus, has not justified the extraordinary relief it requests.[42] PCIA contends that the Commission's actions will cause both irreparable, financial, and competitive harm to PCIA's member paging carriers because they are unable to block access code and subscriber 800 calls from payphones.[43] PCIA argues that without the ability to block calls, paging customers lack the competitive leverage to negotiate alternative compensation

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[36] *Id.* at para. 97.

[37] *See Waiver Order* at para. 10, note 22.

[38] *Id.* at para. 3. Thus, we anticipate that over the waiver period the number of payphones affected by the waiver will continue to decrease as LECs are able to provide the coding digits.

[39] *See* PCIA Motion for Stay at 10 (arguing that delaying compensation would harm other parties minimally if at all).

[40] *Report and Order*, 11 FCC Rcd at 20,567, para. 49.

[41] *Waiver Order* at para. 11-13.

[42] Moreover, courts have held that economic loss, in and of itself, does not constitute irreparable harm for purposes of analyzing stay requests and "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co.*, 758 F.2d at 674. We note that PCIA does not show that the requirements of the *Order on Remand* "will threaten its very existence." In fact, as noted above, paging companies are already blocking some payphone calls.

[43] PCIA Motion for Stay at 9.

arrangements and, further, that PCIA could be forced to absorb the high compensation costs.[44] As discussed above, the Commission adopted a per-call default rate that provides fair compensation to PSPs for the use of payphones to originate access code and subscriber 800 calls. Per-call compensation to PSPs is a cost of providing service that PCIA's members can pass on to their own customers, just as they pass on other costs. To justify a motion for stay, PCIA must demonstrate that the alleged harm is "both certain and great . . . actual and not theoretical."[45] PCIA's unsubstantiated claim that its members could lose customers and be forced out of business due to compensation obligations with regard to "unavoidable and potentially unlimited compensation obligations" does not meet this standard for a stay. PCIA has submitted no concrete, credible evidence to support this allegation.[46] Moreover, as discussed above, the waiver only affects at most 40% of the payphones, and the LEC Coalition provides evidence that some paging companies are already blocking calls from payphones.[47] Regardless, mere "economic loss does not, in and of itself, constitute irreparable harm."[48] Thus, we conclude that PCIA has not shown the "certain and great" irreparable harm that is required to justify a stay.

3. Harm to Others; the Public Interest

12. PCIA has not shown that if we grant the stay "little if any harm will befall other interested persons or the public."[49] As we concluded in the *MCI Order*, a stay would be harmful to other parties and adverse to the public interest because it would deprive PSPs of compensation for subscriber 800 and access code calls.[50] IXCs already have been relieved of part of their burden of paying carrier common line access charges to the LECs insofar as those charges in the past have subsidized LEC payphone operations.[51] Granting a stay of the per-call compensation requirements in addition to the access charge reduction would aggravate the immediate revenue loss to LEC providers of payphone services.[52]

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44 *Id.*

45 A concrete showing of "irreparable" harm is necessary for the grant of a stay. *See Reynolds Metals Co. v FERC*, 777 F.2d 760, 763 (D.C Cir. 1985) (*"Reynolds Metals"*); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("*Wisconsin Gas*").

46 LEC Coalition Opposition at 7.

47 *Id.* at 5.

48 *Wisconsin Gas*, 758 F.2d at 674.

49 *Washington Metro.*, 559 F.2d at 844.

50 *See* LEC Coalition at 7. In contrast, Congress expressly required the Commission to adopt rules "within 9 months" after the enactment of the 1996 Act "to ensure that all payphone service providers are fairly compensated for each and every" payphone call. 47 U.S.C. § 276(b)(1)(A).

51 *MCI Order* at para. 8, note 28, para. 12.

52 *See* LEC Coalition Opposition at 7.

Balancing the equities presented by PCIA's motion for stay, we believe that the public interest is best served by the immediate implementation of the Commission's compensation rules. We believe that Congress made this choice in setting an expedited deadline for Commission action.[53] In the longer term, of course, depriving payphone providers of fair compensation would discourage them from deploying their payphones widely, which would be inconsistent with an express congressional purpose.[54]

IV. CONCLUSION

13. For the foregoing reasons, we find that PCIA has not satisfied the legal requirements that would justify issuance of the requested stay in this case. We, therefore, deny PCIA's motion for stay of the Commission's *Order on Remand.*

V. ORDERING CLAUSE

14. Accordingly, the moving party having failed to justify interim relief, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 1.103(a) of the Commission's Rules, 47 C.F.R. § 1.103(a), and the authority delegated under Sections 0.91, and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the motion for stay of the Commission's *Order on Remand,* filed on December 1, 1997, by Personal Communications Industry Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.

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Chief, Common Carrier Bureau

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[53] Congress made clear that time was of the essence by requiring the Commission to take all actions necessary to implement Section 276 within 9 months "[i]n order to promote competition among payphone service providers to the benefit of the general public." 47 U.S.C. § 276(b)(1).

[54] A purpose of the payphone provision of the Act is to "promote the widespread deployment of payphone services to the benefit of the general public. . . ." 47 U.S.C. § 276(b)(1).